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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITARIAN UNIVERSALIST ASSOCIATION, THE UNITED SYNAGOGUES OF AMERICA, CATHOLICS FOR A FREE CHOICE AND THE EPISCOPAL WOMEN'S CAUCUS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....i

INTEREST OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....6

I. THE SIGNIFICANT OF THIS CASE.....6

II. AFLA IMPERMISSIBLY DISCRIMINATES AMONG RELIGIOUS DENOMINATIONS.....10

III. AFLA LACKS A SUFFICIENTLY SECULAR PURPOSE AND EMPLOYS CONSTITUTIONALLY IMPERMISSIBLE RELIGIOUS MEANS TO ACHIEVE PURPORTED SECULAR GOALS.....19

IV. AFLA HAS THE DIRECT EFFECT OF ADVANCING RELIGION.....26

V. AFLA COMPELS EXCESSIVE ENTANGLEMENT OF GOVERNMENT AND RELIGION.....51

CONCLUSION.....60

APPENDIX

STATEMENT OF INTEREST OF INDIVIDUAL AMICI.....v

TABLE OF AUTHORITIES

Cases: Page

Aguilar v. Felton, 473 U.S. 402 (1985).....passim

Bradfield v. Roberts, 175 U.S. 291 (1899).....45, 47

Brandon v. Board of Guilderland Central School, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).....43, 44, 55

Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).....4, 27, 30,37, 38

Committee for Public Educ. and Religious Liberty v. Reagan, 444 U.S. 646, (1980).....38

Engel v. Vitale, 370 U.S. 421 (1962)....42,59

Epperson v. Arkansas, 393 U.S. 97 (1968).....20,22

Everson v. Board of Education, 330 U.S. 1 (1947).....7, 11, 12, 15

Harris v. McRae, 448 U.S. 297 (1980)....15

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).....37

Larson v. Valente, 456 U.S. 228 (1982)..2,11, 12

Lemon v. Kurtzman, 403 U.S. 602 (1971)..passim

Levitt v. Committee for Public & Religious Liberty, 413 U.S. 472 (1973).....33,38

Lynch v. Donnelly, 465 U.S. 668 (1984)..23,25

Meek v. Pittenger, 421 U.S. 349 (1975)..30,31, 49,53, 54,55, 58

Mueller v. Allen, 473 U.S. 388 (1983)...12

Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976).....4,12, 36,42, 47

School District of Abington v. Schempp, 374 U.S. 203, (1963).....21,41, 42,45, 50

School District of Grand Rapids v. Ball, 473 U.S. 373 (1985).....passim

Stone v. Graham, 449 U.S. 39 (1980).....15,20, 26,35

Tilton v. Richardson, 403 U.S. 672 (1971).....12,47

Wallace v. Jaffree, 472 U.S. 38 (1985)..3,20 22,23 24,25

Walz v. Tax Commissioner, 397 U.S. 664 (1970).....12,

Widmar v. Vincent, 454 U.S. 263 (1981)..43

Wolman v. Walter, 433 U.S. 229 (1977)...28,33 53

Zorach v. Clauson, 343 U.S. 306 (1952)..11,12

INTEREST OF AMICI

This amicus curiae brief is submitted in support of appellees Chan Kendrick, et al. By letters filed with the Clerk of the Court, appellant, appellees and intervenor-appellants have consented to the filing of this brief.

Amici are religious organizations representing over two million persons and thousands of clergy and congregations in all fifty states. While amici have different religious traditions and beliefs, all are deeply committed to the constitutional principle of religious liberty embodied in the Establishment Clause. The statement of interest of individual amici are set forth in the Appendix.

Amici submit this brief limited to the issue of the constitutionality of the

Adolescent Family Life Act (hereinafter "AFLA"). Amici do not address the issues of standing or severability.

SUMMARY OF ARGUMENT

This case involves issues of central importance to the Establishment Clause. AFLA violates each Establishment Clause test articulated by this Court.

The statute both on its face, discriminates among religious denominations based on their religious tenets. Such facial discrimination requires the application of strict scrutiny. Larson v. Valente, 456 U.S. 288 (1982). AFLA does not pass muster under the strict scrutiny test because there is no compelling state interest which justifies he direct funding of certain religious organizations to teach and counsel based on their religious tenets.

AFLA also fails each prong of the Lemon v. Kurtzman, 403 U.S. 602 (1971) test. An actual purpose of AFLA is to involve religions in their traditional sectarian role as transmitters of values and to promote a religious response and solution to a secular problem. AFLA changed the law of an existing statutory program on adolescent pregnancy by inserting explicitly religious references and AFLA permits the use of explicitly religious material in its programs which indicate government's endorsement of religion. Wallace v. Jaffree, 472 U.S. 38 (1985).

AFLA has the direct effect of advancing religion in that it provides federal funds directly to grantees including churches and parochial schools for teaching and

counselling on subjects which are at the core of religious belief and inherently susceptible to religious indoctrination, Lemon v. Kurtzman, supra; School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). AFLA subsidizes the religious mission of sectarian grantees by, inter alia, funding pre-existing programs and financing programs and material made available only to members of particular congregations and faiths.

AFLA lacks any statutory safeguards to assure that aid cannot be diverted to religious functions. Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). AFLA constitutes an endorsement of religion, which is of particular constitutional concern because the AFLA program is directed to children and adolescents who are

more likely to perceive government sponsorship of a program run by a religious organization in a religious setting using explicitly religious material as government endorsement of that theology. School District of Grand Rapids v. Ball, supra.

Finally, AFLA compels excessive entanglement of government and religion in the administrative review and audit of AFLA programs, Aguilar v. Felton, 473 U.S. 402 (1985), Lemon v. Kurtzman, supra. In operation the entanglement of government and religion has been pervasive, at every level, from review of grant proposals, to approval of teaching materials to routine site visits and financial audits. Aguilar v. Felton, supra.

Measured by any of this Court's Establishment Clause tests, AFLA is unconstitutional.

I.

THE SIGNIFICANCE OF THIS CASE

The Adolescent Family Life Act ("AFLA") on its face and as it has operated, fails each Establishment Clause test articulated by this Court and jeopardizes the constitutional values of religious neutrality and separation that are the cornerstones of constitutional liberty. The statute explicitly permits and contemplates the payment of federal funds directly to churches and other religious organizations for programs that counsel and instruct children and adolescents in subjects such as family life, sexuality and marriage, topics which are inherently susceptible to religious indoctrination. Consistent with the intent of Congress, that is precisely what has happened. Some of the federally sponsored programs have been held in religious

settings including churches and parochial schools.

AFLA on its face and in operation violates the most fundamental precepts of Establishment Clause. In Everson v. Board of Education, 330 U.S. 1, 16 (1947) Justice Black wrote for the Court:

> . . .no tax in any amount large or small can be levied to support any religious activities or institutions whatever they may be called or whatever form they may adopt to teach or practice religion.

Recently this Court reiterated the continued vitality and understanding of this absolute prohibition:

> Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.

Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985) (citations omitted).

AFLA provides government financing for activities which constitute religious indoctrination.

The appearance of government endorsement of particular religious views inherent on the face and in the practice of AFLA is unprecedented in recent Constitutional history. (See Point IV, infra). An equally grave constitutional violation is the explicit discrimination among religious denominations, based on theological content. (See Point II, infra).

From the time of drafting of the Bill of Rights to the most recent decisions of this Court interpreting and applying the Establishment Clause, the importance of strict enforcement of the separation of church and state in protecting fundamental liberty has been recognized:

> The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion," as our cases demonstrate, is more than a pledge that no single religion will be designated as a state religion. . . . .It is also more than a mere injunction that governmental programs discriminating among religions are unconstitutional. . . .The Establishment Clause instead primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Grand Rapids School District v. Ball, 473 U.S. at 381.

A review of the extensive record of this case is chilling -- and establishes beyond peradventure that AFLA funds have been used, with government knowledge and approval by religious organizations to disseminate explicitly religious material on sexuality and childbearing to young people. This is precisely the sort of government supported indoc-

trination that the Establishment Clause absolutely forbids.

II.

AFLA IMPERMISSIBLY DISCRIMINATES AMONG RELIGIOUS DENOMINATIONS

AFLA violates the fundamental constitutional principle of neutrality among religious denominations. On its face and as applied the AFLA effects an impermissible discrimination among denominations, and thus it cannot survive this threshold Establishment Clause test.

The District court failed to apply the clear precedents of this Court on discrimination and erred in finding that strict scrutiny was not required because AFLA "does not discriminate on the basis of religious affiliation or belief." 657 F.Supp. at 1557.

Denominational neutrality is a central principle embodied in the Establishment Clause. Government may not "pass laws which aid one religion" or that "prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947); see also Zorach v. Clauson, 343 U.S. 306, 314 (1952). Most recently the Supreme Court expressed and applied this principle in Larson v. Valente, 456 U.S. 228, 244 (1982):

> The clearest command of the Establishment Clause is that one denomination cannot be preferred over another.

When a statute affecting religious organizations discriminates among religious denominations on any grounds, a court must "treat the law as suspect and ... apply strict scrutiny in adjudging its constitutionality." Larson v. Valente, 456 U.S. at 246. AFLA distinguishes among religions on the basis of

theological content, and thus is more invidious than the discrimination invalidated in Larson v. Valente, 456 U.S. 228 (1982). The discrimination is particularly clear since AFLA, unlike the program invalidate in Larson involves direct payment by the government to religious organizations. The benefit is direct, financial and substantial.[1] AFLA

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[1] A necessary characteristic of government programs that aid or assist religion without violating the Establishment Clause is that the government aid be equally available to all religious groups. See, e.g., Everson v. Board of Education, 330, U.S. 1, 13-14 (1947) (transportation of all non-public and public school children); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (released time off school premises for any religious instruction); Walz v. Tax Commission, 397 U.S. 664 (1970) (property tax exemption for religious and non-religious property); Roemer v. Board of Education Public Works, 426 U.S. 736 (1976) (grants to all private colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants to all public and private schools); Mueller v. Allen, 463 U.S. 388 (1983) (income tax deductions for parents of either private or public school children). In sharp contrast, AFLA aid in the form of direct (footnote continued)

clearly effects discrimination among denominations. The combination of an explicit invitation to religious organizations to participate in AFLA programs in their religious capacity and the restrictions on grantees based on their view of abortion limits the participation by "religious organizations" to certain religious denominations. Amici organizations are among the many religious denominations foreclosed from participating in AFLA because they cannot conscientiously counsel adolescents on pregnancy and not discuss the option of abortion.

It is incontrovertible that religious denominations position on abortion vary. Some religions view abortion as a always a sin against God, others view abcrtion as an option

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(footnote continued from previous page) payments is not available to all religious denominations.

to be pursued under some circumstances, whereas other religions view abortion as a matter of conscience and a religious choice. J.A. 590-607. Amici firmly believe that each denomination approaches the issue as a serious matter of faith (see J.A. 590-607) and that the government must accord each religious position with equal respect. AFLA discriminates among religions by endorsing some explicitly religious teachings on abortion (through financing, publication and dissemination), to the disparagement and detriment of other, equally sincere religious teachings on the subject. This government sponsorship and endorsement of explicitly religious teaching on a religious subject which are inconsistent or antithetical to other religious teachings, is at the core of the constitutional protec-

tions afforded by the Establishment Clause.[2] "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Everson v. Board of Education, 347 U.S. 1, 15-16 (1947)

Methodist religious principles teach that individuals have a moral obligation to make a fully informed and conscientious decision about pregnancy. (J.A. 683)

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[2] Harris v. McRae, 448 U.S. 297 (1980) is not relevant to consideration of the discrimination claim. At issue here, unlike McRae, is the propriety of the federal government's direct funding of religious organizations to teach and counsel children and adolescents on their religious tenets on abortion. A review of the material created and used by AFLA grantees proves unmistakably that the abortion is presented in a theological or religious context. E.g., J.A. 257, 274, 426, 513. While as this Court found abortion may be a moral or secular or health issue for a government, it is quite clear that for the religious grantees of ALFA abortion is a religious issue on which they speak religiously. Cf. Stone v. Graham, 472 U.S. 39 (1980).

Unitarian principles on abortion also promote conscientious decision making by individuals on the issue of abortion. (J.A. 683)

Mainstream Jewish religious teaching is that personhood of a fetus is attained at birth, so abortion cannot be characterized as "murder" or "killing." (J.A. 599-600, 683) Abortion may be acceptable under certain specific conditions, particularly those in which the mother's physical or psychological health is threatened.

Since AFLA does not permit participation by grantees who counsel or refer for abortions and in programs funded by AFLA proscribes discussion of abortion consistent with these religious mandates, amici and other religious organizations cannot participate in AFLA in the manner that Catholic, Mormon and

fundamentalist religious organizations are permitted by the statute and do participate -- as religious organizations.[3]

Many if not most religious denominations, churches and synagogues, sponsor programs and counsel adolescent members on issues of family life, sexuality, relationships and marriage. Amici operate such programs in their churches and synagogues.

The record is clear that AFLA funds have been used to support and promote pre-existing Catholic, and fundamentalist programs

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[3] Amici note that while the proscription against dissemination of their religious position on abortion as a conscientious choice and an option all or in some circumstances in dealing with unwanted often health or life-threatening teenage pregnancy is manifest in the statute, see 42 U.S.C. 300z, and in the administration of the statute, there is apparently no restriction placed on religious grantees from writing or speaking about abortion as sinful or wrong. AFLA grantees have published material and counselled adolescents on that basis under the auspices of AFLA. See J.A. 274, 426, 513.

of family life, sexuality, relationships and marriage. See, e.g., J.A. 210, 223. Not only is this financial aid a direct advancement of the religious mission of those churches (see Point IV, infra) but it also constitutes the most invidious form of discrimination among religious denominations.

No compelling state interest justifies this discrimination. The appropriate inquiry in the case at hand is whether there is a compelling state interest to involve directly and fund certain religious organizations as part of the government's response to the problem of adolescent pregnancy. No compelling state interest has been proferred. Amici contend that there is no such compelling state interest.

Assuming arguendo, that the state interest is the prevention of adolescent

pregnancy through teaching "chastity" and discouraging abortion, then the means employed to achieve that goal, i.e., provision of federal funds directly to certain religious organizations (and foreclosing others) are not sufficiently narrowly tailored. If there is a legitimate secular purpose in teaching chastity, then the government must use exclusively secular means to achieve it. Because there is no compelling state interest which justifies the discrimination among religious groups caused by the AFLA, it cannot survive the strict scrutiny that must be applied.

III.

AFLA LACKS A SUFFICIENTLY SECULAR PURPOSE AND EMPLOYS CONSTITUTIONALLY IMPERMISSIBLE RELIGIOUS MEANS TO ACHIEVE PURPORTED SECULAR GOALS

The first requirement of a legislative program is that it have a secular pur-

pose. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971; Epperson v. Arkansas, 393 U.S. 97, 98 (1968); Wallace v. Jaffree, 472 U.S. 38, 56 (1985). Mere articulation of a "secular purpose" for challenged legislation is not "sufficient to avoid conflict with the First Amendment." Stone v. Graham, 449 U.S. 39, 41 (1980). The court must look beyond "avowed" purpose of the challenged statute or program and determine whether the "actual purpose" of the legislation is to endorse or disapprove of religion.

Amici believe that there exists a legitimate, secular concern for addressing and alleviating the life-and health-threatening problems which often result from teenage pregnancy. Amici have supported government programs of free, confidential health care and counselling for adolescents. However, it is

clear that a real purpose of AFIA is to involve certain religions in their traditional sectarian role as transmitters of religious values, and to promote a religious solution to the secular problems relating to teenage pregnancy, by directly funding certain religious organizations. That the government may not do. Amici contend that valid secular objectives concerning teenage pregnancy can and must be addressed by the government without resort to direct funding of a few religious organizations.

The Establishment Clause forbids not only government aid to programs which seek to achieve explicitly sectarian goals, but also "the use of religious means to achieve secular ends where non-religious means will suffice." School District of Abington v. Schempp, 374 U.S. 203, 280-81 (1963) (concurring opinion of

Brennan, J.). AFLA clearly transgresses this "means" test. Defendant cannot show that participation by and financial support of religious organizations are necessary to achieve any proper secular goal.

As Establishment Clause jurisprudence has developed over two decades, the secular purpose prong of the tripartite Lemon test, although the most easily satisfied, is not inevitably met. Government programs have been invalidated for lack of secular purpose where the program imposed religious material in secular educational programs for children and adolescents. Epperson v. Arkansas, 393 U.S. 97 (1968); Stone v. Graham, 449 U.S. 39 (1980) or amended an existing statutory scheme to add an explicit religious reference and endorse religion. Wallace v. Jaffree, 472 U.S. 38 (1985). AFLA, which amended an exist-

ing statutory scheme by including explicit religious references, and has used and imposed religious material in its programs directed at children and adolescents. (See, e.g., J.A. 234, 344-53, 367-68; 417-426).

The purpose prong of the Lemon test as refined by this Court in Wallace v. Jaffree, 472 U.S. 38 (1985) is an inquiry into whether the "actual purpose" of the statute "is to endorse or disapprove of religion." 472 U.S. at 56 citing Lynch v. Donnelly, 465 U.S. at 690 (O'Connor, concurring). The methodology utilized by the Court for examining the "actual purpose" of the challenged statute-scrutiny of both legislative history and the replaced statutory program, is applicable and appropriate in this case. Here, as in Jaffree, such examination reveals clearly that an actual purpose of AFLA is to endorse

religion -- specifically to endorse and finance an explicitly religious approach to a secular problem.

The legislative history makes clear that the sponsors of AFLA were "motivated to change the law," Jaffree 472 U.S. at 59. Congress repealed an existing teenage pregnancy prevention program and enacted AFLA in order to promote a religious solution to the problem of teenage pregnancy. The addition of numerous references to religion in the statute itself and the imposition of a programmatic requirement that all grantees religious or secular, involve religions in their program[4] are more than an "indications" that Congress intended to characterize religious teaching on adolescent sexuality and pregnancy as a "favored" - and funded - practice. Jaffree,

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[4] 42 U.S.C. § 300-5(a)(21).

472 U.S. at 60. "Such an endorsement is not consistent with the established principle that government pursue a course of complete neutrality toward religion." Id. (citations omitted). The Alabama statute at issue in Jaffree unmistakenly endorsed religion. No less clear is the endorsement of religion embodied in AFLA.

The District Court's formulation and application of the purpose test (657 F.Supp. at 1558-9) is inconsistent with the standard articulated by this Court in Wallace v. Jaffree, and Lynch v. Donnelly (O'Connor, J. concurring). The Court failed to make the detailed comparison of the old statutory scheme and AFLA, which comparison reveals that a significant purpose of the legislation was to endorse a religious response to a secular problem.

However, even assuming arguendo that AFLA reflected a proper secular purpose, the statute must still be invalidated if it fails either the effect or entanglement prong of the Lemon test.[5] It is abundantly clear that AFLA fails both.

IV.

AFLA HAS THE DIRECT
EFFECT OF ADVANCING RELIGION

Government action "may neither advance nor inhibit religion." Lemon v. Kurtzman, 403 U.S. at 612. The second prong of the Supreme Court's Establishment Clause test determines whether a statute has a direct

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5 "This court has announced a three-part test for determining whether a challenged . . . statute is permissible under the Establishment Clause . . . If a statute violates any of these three principles, it must be struck down under the Establishment Clause." Stone v. Graham, 449 U.S. at 40. (Emphasis supplied.)

effect of advancing religion. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). The District Court's holding that on its face and as applied AFLA has "the primary effect of advancing religion" (657 F.Supp. at 1551) is fully supported by the law and the substantial factual record.

In determining the effect of a challenged program this Court has examined three factors: (1) the nature of the aid; (2) nature of the activities sponsored; and (3) the nature of the institution or individuals receiving the aid. AFLA provides federal funds directly to grantees, and permits religious organizations, including churches, to become grantees and thus to receive federal funds directly for programs of teaching and counselling. AFLA programs involve one-on-one

and group counselling and teaching on issues such as sexuality, marriage and pregnancy. AFLA funds are used to pay teacher and counsellor salaries and fund the creation, and dissemination of written and media materials. Thus the nature of the aid involved is comparable to teachers' salaries, textbooks and instructional material considered by the Court in Lemon, supra; Meek, supra; Aguilar, supra; and Wolman v. Walter, supra. The direct provision of funds to sectarian institutions for this purpose, is intolerable under the Establishment Clause.[6]

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[6] Amici submit there is no question that the involvement of religious organizations contemplated under AFLA is qua religious organization, not because the religious organization performs a secular task, e.g. operates a hospital. It strains credibility to ague that religious organizations were included in AFLA only to the extent that religious organizations sponsor and participate in community organizations. Such an interpretation renders the statutory language redundant.

(footnote continued)

AFLA has subsidized the primary religious mission of sectarian institutions that receive its funds by augmenting or combining with their religious education, e.g., J.A. 117, 166, 210, 223, 341, 408, 412-13. AFLA programs have been directly controlled by the religious aim of grantees including priests and parish advisory committees, J.A. 147, 197.

The Supreme Court has struck down numerous government programs that provided aid directly to religious schools or to teachers employed by religious schools, as AFLA provides aid directly to religious institutions and/or their employees, because such programs

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Moreover, examination of the programs actually funded shows that direct involvement by core religious functions such as parishes and parochial schools and the use of explicitly religious material is deemed by the government to be within the purpose of the act.

inevitably advance religion. Grand Rapids School District v. Ball, 473 U.S. 373 (1985). Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). As described in detail below the direct funding of religiously affiliated teachers and counsellors has actually had the effects that this Court warned against.

It is abundantly clear that government funding of religiously infused teaching and counselling cannot be permitted consistent with the Establishment Clause. In Lemon v. Kurtzman, the Supreme Court invalidated a program that provided state aid to teachers of purely secular subjects in religiously affiliated schools, in part because the court found an impermissibly high risk that religious values and views might be transmitted to stu-

dents during instruction of mathematics, history and other secular subjects:

> In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.

403 U.S. at 617.

That rationale was reaffirmed and reinforced in Grand Rapids v. Ball:

> [w]hether the subject is "remedial reading", "advanced reading" or simply "reading" a teacher remains a teacher and the danger that religious doctrine will become intertwined with secular instruction persists.

473 U.S. at 388, citing Meek v. Pittenger.

Amici submit that when the subjects are as value-laden and closely tied to religious tenets as sexuality, procreation and

family, the transmission of religious values is unavoidable. And, as the record amply reflects, the risk has not been avoided by AFLA in operation.[7] AFLA programs have been

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[7] This rule does not require the court to find that potential AFLA grantees, who are affiliated with religious organizations, would intentionally violate the Establishment Clause. As the Supreme Court found in Lemon, it is not a matter of bad faith, but rather the inextricable combination of functions which precludes direct state aid to religiously affiliated teachers:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to

(footnote continued)

presented in parochial schools and other religious settings which contain religious symbols. J.A. 114, 166, 170-171, 211, 412-13. Some AFLA programs were opened or closed by a priest with prayer, J.A. 248, 278.

For the sectarian grantees both the counsellor/teachers and the materials are subject to the specification of religiously affiliated supervisors and teachers, see J.A. 108-09 (grantee refused to alter religious content of program), 197, 284-85. The exercise of such control was fatal to the program invalidated in Lemon v. Kurtzman, supra; Levitt v. Committee for Public Education, 413, U.S. 472 (1973) and Wolman v. Walter, 433 U.S. 299 (1977).

(footnote continued from previous page)

> be essential to good citizenship might well for others border on or constitute instruction in religion.

403 U.S. 618-19

The record is replete with examples of explicitly religious material used in AFLA programs. Material produced or used by current AFLA grantees is explicitly religious, e.g., "47 Reasons to Wait," used by grantee Women's Choice:

> 1. God commands us to be pure . . . .
> 5. God has set sex aside for the marriage relationship . . . .
> 26. Jesus can fill the need for intimacy without sex . . . .
> 30. It is poor testimony for Christ.[8]

In a similar vein is the Woman's Choice publication, "37 Ways to Say No":

. . . .

> 3. Build a relationship With Jesus so that your loneliness will be satisfied . . . .
> 8. Meditate on God's Word to be 'transformed by the renewing of your mind.' . . . .

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[8] Material from current AFLA grantees, not contained in the Joint Appendix, has been lodged with the Court by NOW Legal Defense Fund.

> 21. Commit each date to the Lord; be Christlike and act like Jesus would if he were on a date.[9]

The religiosity of this message is equivalent to the religious content of the Ten Commandments. Cf, Stone v. Graham, 449 U.S. 39 (1980).

AFLA Lacks Any Safeguards

As the District Court correctly found AFLA, perhaps alone among statutory programs challenged under the Establishment Clause, contains no restrictions whatsoever against the teaching of religion qua religion or any attempt to restrict the education and counselling process from "intentionally or inadvertently inculcating religious belief." 657 F.Supp. at 1562-63, (footnote omitted).

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[9] Material lodged, see n.8, supra.

In order to sustain a program which channels funds directly to religious institutions from facial attack under the Establishment Clause, the aided institutions must demonstrate the capability of separating secular and religious functions. Roemer v. Maryland Public Works Board, 426 U.S. 736, 766 (1976), or contain stringent safeguards to assure that state aid cannot be diverted to sectarian uses. These are very high standards that most religious organizations and institutions, including parochial elementary and secondary schools, are inherently incapable of achieving. Since AFLA does not, on its face, even attempt to limit participation to religious organizations that can separate religious and secular functions this test cannot be satisfied.

For any program involving government funding, the Establishment Clause demands stringent safeguards to assure that government aid for secular purposes cannot be diverted to or combined with uses that advance religion. Unless a government program provides aid to sectarian institutions which, by its nature, cannot be diverted to religious purposes, the government program must provide "effective means for guaranteeing" that aid "will be used exclusively for secular, neutral, and non-ideological purposes." Committee for Public Education v. Nyquist, 413 U.S. at 780; Larkin v. Grendel's Den, Inc., 459 at 125-26. An examination of the guarantees that have failed to past muster reveals that this requirement of guarantees is both fundamental and stringent. Lemon v. Kurtzman, 403 U.S. at 619 ("pervasive restrictions"); compare Levitt v.

Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973) (program for reimbursement of testing and scoring) with Committee for Public Educ. & Religious Liberty v. Reagan, 444 U.S. 646, 658 (1980).

The statute contains no safeguards that in any way can guarantee that federal funds will be used exclusively for secular, non-ideological purposes. Indeed, even if proferred, such guarantees would not be meaningful because the nature of the activities funded under AFLA -- teaching and counselling -- are so open ended that the possibility of an effective secular guarantee is precluded. Committee for Public Educ. v. Nyquist, 413 U.S. at 780. Lemon v. Kurtzman, 403 U.S. at 618-19. School District Grand Rapids v. Ball, 473 U.S. at 387-88 (1985). As the District Court properly found, AFLA has not and cannot

provide such safeguards (657 F.Supp. at 1562-63), which is fatal to the statutory scheme.

Moreover, amici contend, based on the experience and operation of their own congregations, that the religious personnel most likely to apply for participation in AFLA are those who teach and counsel on matters of adolescent sexuality, pregnancy, and family life for their congregations, core religious functions from which secular functions cannot be separated.[10]

In sum, given: (1) the nature of the aid (direct financial payment); (2) the nature of the activities sponsored (counselling and teaching on matters of sexuality and family life); and (3) the nature of the institutions receiving the aid (churches and

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10 The record reflects that priests (in clerical garb) and nuns have been principal presenters and administrators in AFLA sponsored programs. See J.A. 208, 278, 297.

other religious organizations, not students, parents, or individual participants in AFLA) and the lack of proferred or possible safeguards to guarantee that aid would be used solely in a secular, nonideological manner. This Court's precedents compel the conclusion that a direct effect of AFLA is to advance that religious purposes of religious grantees.

AFLA Constitutes An Endorsement of Religion

The danger which the Establishment Clause protects against is not only to creation of a monolithic national church but also the fusion of government and religion, which begins when government endorses or supports the theological tenets of one religion or several, over others. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of

> government and religious functions or a concert or dependency of one upon the other to the end that official support of the state or federal government would be behind the tenets of one or of all orthodoxies; this is what the Establishment Clause prohibits.

School District of Abington v. Schempp, 374 U.S. at 222.

AFLA, on its face and most clearly, in practice, has placed the government "behind the tenets" of some religious, to the detriment of amici and other religions. AFLA religious grantees and AFLA administrators consider that the government has endorsed their religiously based programs and approach (see e.g., J.A., 213 "Bishop Announces Grant . . . . given for a new course in family centered sex education which will be offered to parish religious education programs . . ."), J.A. 120.

As this Court noted most recently in Grand Rapids v. Ball, supra, programs directed at children and adolescents, like AFLA, is subjected to particularly rigorous Establishment Clause scrutiny. "The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the government message are children in their formative years." 473 U.S. at 390 (footnote omitted). This Court and circuit Courts have fashioned an analytical distinction of constitutional dimension between programs involving college students or adults, and programs involving children and adolescents. School District of Abington v. Schempp, 374 U.S. at 252-53. ("This distinction warrants a difference inconstitutional results."); Engel v. Vitale, 370 U.S. 421 (1962); see Roemer v.

Maryland Public Works Board, 426 U.S. 736, 764, (1976).

Adolescents are less able to distinguish secular from sectarian functions. The risk is that adolescents will perceive government sponsorship of a program run by a religious organization as a government endorsement of that organization and its theology. Activities that are permitted on university campuses, such as voluntary prayer group meetings, are prohibited in secondary schools. Widmar v. Vincent, 454 U.S. 274 (1981); Brandon v. Board of Guilderland Central School, 635 F.2d 971, 978 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).

Adolescence is a time of maturing, values clarification and the beginning independent decision making. Chief Judge Kaufman of the Second Circuit explained:

> ". . . .Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected. As Alexander Pope noted, 'Tis Education forms the common mind,/Just as the twig is bent, the trees's inclin'd.' (Epistle to Lord Cobham)."

Brandon v. Board of Guilderland Central School, 635 F.2d at 978.

Amici submit that the same concerns are present when adolescents observe that one or several churches or religious organizations receive government funds for running a "secular" program for adolescents. It is inevitable that adolescents will perceive an expression of government approval for those denominations that participate in AFLA.

By providing government sponsorship of programs that employ teachers and counsellors affiliated with particular churches, AFLA, in effect, assists those churches to "gain and keep adherents." School District of

Abington v. Schempp, 374 U.S. at 228 (concurring opinion of Douglas, J.). The Establishment Clause does not permit use of the government to advance religion in this manner:

> The Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone.

Id. at 229. Government sponsorship of programs run by and identified with specific religious denominations will certainly have the effect of giving those denominations greater strength in recruiting adolescent members.

Bradfield v. Roberts, 175 U.S. 291 (1899), heavily relied on by the government and the intervenors, is not analogous. First, the activity involved in Bradfield, operating

a hospital, was found to be a secular activity performed pursuant to a secular charter. The activity is different in nature from teaching and counselling, which are core religious functions, in a way that hospital administration is not. Second, a crucial factor in Bradfield was the finding of non-discrimination -- that the benefits of the Congressional grant were available to all persons irrespective of religious belief. On this point as well, the distinction from AFLA is evident. Grants are not available to all religions that offer programs on adolescent sexuality and childbearing. (See Point II, supra). In addition, at least some AFLA programs have been limited to participation to adolescents of a particular religious faith.[11] Thus on

[11] This limitation is effected by, inter alia, publicizing the program exclusively or principally in church bulletins or letters to (footnote continued)

its face and on the facts AFLA is distinguishable from Bradfield.

There is no suggestion in Bradfield that it is permissible for sectarian organizations performing purely secular functions use explicitly religious materials or in any way attempt to inculcate religious belief. As Bradfield has been interpreted by this Court it is apposite only in situations where the separation of secular and sectarian functions is not only theoretically possible, but also guaranteed by adequate statutory or programatic safeguards. Cf, e.g., Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672, 676-77,

(footnote continued from previous page) members of a congregation, J.A. 117, 170, 204; or by presenting programs in parochial school classes, J.A. 412-13, or in place of the usual Confraternity of Christian Doctrine (CCD) classes, J.A. 408; or in religious education classes, J.A. 210.

679 (1971) (Act ensured aid would be devoted to secular functions.) AFLA contains no such guarantees or safeguards. Given the nature of the activities involved -- counselling and teaching -- such safeguards can never be effective since the activities are so close to the core of religious functions.

Amici submit that striking down AFLA will not end the participation by religious groups in providing necessary public welfare functions, any more than the consistent ban on State aid to parochial schools did. Religious organizations may constitutionally perform purely secular functions in a purely secular way (and may receive government funds in support of such activities.) This case does not present a compelling reason for this Court to depart from decades of settled precedent which proscribes direct aid to churches and paro-

chial schools for educational and counselling activities (because such subsidized activities invariably advance the religion); and government endorsement of particular religious views.

Lemon v. Kurtzman, supra; Meek v. Pittenger, supra and Aguilar v. Felton, supra, are more analogous authorities because the nature of the activities (teaching) are closer to what is offered though AFLA (teaching and counselling) and the nature of the aid is similar (direct grant, for programs and materials as well as teachers salaries). The problems presented by the nature of the aid and the nature of the institutions, i.e., advancement of religious purpose and inability to separate secular and religious functions were not present in Bradfield.

It is no defense to an Establishment Clause challenge that AFLA is in the nature of an experiment -- a small program to attempt a new approach to a vexing social problem. The liberty interests embodied in the Establishment Clause are fundamental, and their violation is irreparable. This Court has stated unequivocally that government may not experiment with sponsorship of religious solutions to secular problems:

> ". . .it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"

Abington School District v. Schempp, 374 U.S. at 225 (citations omitted).

V.

AFLA COMPELS EXCESSIVE ENTANGLEMENT OF GOVERNMENT AND RELIGION

AFLA invites and indeed compels excessive entanglement of government and religion by encouraging and permitting grants to religious institutions. The Supreme Court has identified two components of this prong of the Lemon test: (1) whether the challenged programs involve administrative interference with surveillance of religious activities; and (2) whether the challenged program fosters political divisiveness. Lemon v. Kurtzman, 403 U.S. at 621-22. AFLA fails both parts of the entanglement test. In making these determinations, the Court has directed inquiry into three factors: the character and purposes of the aid recipients; the nature of the aid and the resulting relationship between government and religion. Id. at 615.

Two types of monitoring are a necessary part of an AFLA program: (1) routine financial auditing of the use of AFLA funds; and (2) surveillance to guarantee that AFLA programs are not used to transmit religious ideology. In this context both types of monitoring are excessively entangling.

Excessive administrative entanglement is inevitable when the government provides aid directly to religious organizations or institutions, as is permitted and encouraged by AFLA. All programs that receive government grants are subject to inspection and audit. Such necessary surveillance "creates an intimate and continuing relationship between church and state and an excessive entanglement." Lemon v. Kurtzman, 403 U.S. at 622.

AFLA involves the government in the review and approval of texts created by religious organizations for use in AFLA sponsored teaching and counseling. A large part of AFLA program is counseling or teaching. This Court has consistently recognized that it is impossible to monitor the content of a teacher's (or counsellor's) activities and speech without an excessive entanglement. Meek v. Pittenger, 421 U.S. 349, 370 (1975); Lemon v. Kurtzman, supra; Wolman v. Walter, 433 U.S. 299 (1977); Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School District v. Ball, 473 U.S. 373 (1985). This is true whether the teacher or counsellor is religiously affiliated or not.

The record shows and the government has conceded, that a number of AFLA programs are being presented in parishes and parochial

schools. J.A. 114, 166, 170-71, 210-11, 341, 408, 412-13, 518. The monitoring of those programs presents the precise entanglement problem that required invalidation in Aguilar v. Felton, Lemon v. Kurtzman, Meek v. Pittenger.

The inquiry that this Court must make regarding administrative entanglement is the same as that made in the parochial school aid cases, and the holdings in those cases must govern here. The most relevant factor is that the aid under AFLA goes directly to religious institutions, not to adolescents or parents. This type of aid is not less entangling than the following programs and practices, which have been held to excessively entangle government and religion: public employees providing remedial programs in non-public schools (Aguilar v. Felton, 473 U.S. at

408-14); subsidies to teachers of secular subject (Lemon v. Kurtzman, 403 U.S. at 615-18); the loan of equipment to non-public schools (Meek v. Pittenger, 421 U.S. 371); furnishing auxiliary remedial services (id. at 372); and providing non-participating supervision of students during voluntary prayer meetings (Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971, 979 (2d Cir. 1980).

In operation, the entanglement between government and religion in the administration of AFLA has been pervasive and overwhelming. Religious affiliated grant readers reviewed and made recommendations on proposals from both religious and secular grantees. J.A. 98, 103, 108-109, 113. The readers rejected some applications on the ground that religion was not sufficiently present.

J.A. 132-34, 135. Once grants were awarded, religious grantees submitted explicitly religious material to the supervising agency for approval for use in AFLA programs, and received such approval from the Government. (J.A. 630). In addition, government employees monitored (or should have monitored) programs which were given in parishes and parochial schools, including on-site inspections. This type of involvement is clearly entangling.

Even where monitoring of content is possible and effective, such supervision "inevitably results in the excessive entanglement of church and state, and Establishment Clause concern distinct from that addressed by the effect doctrine." Aguilar v. Felton, 473 U.S. 402, 409 (1985).

The entanglement involved in AFLA is far more extensive than the entanglement found

to be excessive in Aguilar, Lemon or Meek. AFLA supervision involves more than a set of rules and monthly unannounced visits to parochial school classrooms to monitor the performance of public school employees, see Aguilar v. Felton, 473 U.S. at 428 (O'Connor, J. dissenting). In addition to the normal financial monitoring, religious readers review applications, and government employees work with religiously affiliated persons to shape the content of AFLA programs. Disputes over the religious content of AFLA programs have led to the curtailment or dropping of programs.[12]

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12 At least one AFLA program has been defunded for being insufficiently religious, see J.A. 132-35, and at least one other was reprimanded and defunded for being too religious or accessible to only a limited a group, see J.A. 742. Both of these examples reflect a degree of entanglement between government and religion which is intolerable under our constitutional framework: "state" inspection

(footnote continued)

Moreover, AFLA possess the exact divisive political potential identified by the Supreme Court in Lemon -- "successive . . . appropriations that benefit relatively few religious groups." 403 U.S. at 623. While AFLA programs will not necessarily require "successive annual" appropriations, it is very likely that program grantees, including religious organizations, will seek continuing government support for both their individual grants and the AFLA program as a whole and, as a result, "political factions supporting and opposing the programs will divide along religious lines." Id. See also Meek v. Pittenger, 421 U.S. 349, 372.

(footnote continued from previous page)
and evaluation of the religious content of a religious organization creates a "relationship pregnant with the dangers of excessive government direction of . . . churches." Lemon v. Kurtzman, 403 U.S. at 620.

This Court need not engage in speculation of future controversy over AFLA funding in order to find constitutionally fatal political divisiveness. AFLA embodies not only the potential for future political divisiveness but a past history of highly charged political action to enact religious belief, which parallels the explosive political context of the school prayer cases. See Engel v. Vitale, 370 U.S. 421 (1962). This program has fostered political divisiveness in the communities where amici and plaintiff clergy live and worship, and operate their family life programs for adolescents in competition with the religious programs taking place in the parish or church school down the street which has been augmented by federal funds and benefitted by government endorsement. The phenomenon of political divisiveness inherent in AFLA on its

face and fulfilled in its practice is concrete, not elusive. Aguilar v. Felton, 473 U.S. at 429 (O'Connor, J. dissenting).

The constitutional principles of the religion clauses of the United States were shaped by recognition of the

> . . . anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval. . .

Id. at 429.

AFLA fails both the administrative entanglement and political divisiveness tests of Lemon v. Kurtzman, and its progeny, and must be held to be unconstitutional on this ground as well.

CONCLUSION

For all of the foregoing reasons amici respectfully request this Court find

that AFLA violates the Establishment Clause of the united States Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENT OF INDIVIDUAL AMICI

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis humanae, 7 December 1965) which declares:

> ". . . the civil authority must see to is that the equality of the citizens before the law, which is itself an element of the common good of society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

The Episcopal Women's Caucus ("EWC") is an organization of Episcopal laity, bishops, priests and deacons who are committed to the full inclusion of women in all aspects of life of the church and the world. The EWC and the Episcopal church as a whole have long been on record as strong supporters of the individual's right and responsibility to make

informed decisions concerning contraception and abortion. The EWC believes that AFLA will substantially interfere with efforts to allow people to make such well-informed decisions and will result in government-sponsored promotion of religious tenets, which are anti-ethical to the beliefs of our organization and the teaching of our church.

The Unitarian Universalist Association ("UUA") has its national headquarters in Boston, Massachusetts and represents 138,000 adherents of liberal religious values and has 1,010 churches with 1,047 clergy. The Unitarian Universalist Association seeks to join in this brief based upon its policy of amicus intervention in First Amendment cases. UUA is a member-organization of PEARL which is submitting a brief amici curiae.

The United Synagogue of America represents over 1.5 million Conservative Jews and over 800 Conservative congregations throughout the United States. It is deeply committed to the preservation of individual liberties and the separation of church and state. At its 1975 Biennial convention, a resolution was passed stating that "abortion involves very serious psychological, religious and social problems, but the welfare of the mother must always be our primary concern." The resolution emphasized that abortion is permissible under certain circumstances, particularly where the mother's physical or psychological health is threatened. The resolution also urged affiliated congregations to oppose any legislative attempts to weaken the force of the Supreme

Court's decision allowing for choice in this matter.